Supreme Court, U.S.
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No. 94-749

In The

Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, Individually and the SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,

Petitioners,

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, An Unincorporated Association By and Through TIMOTHY DALEY, BARBRA KAY, and CATHLEEN FINN, Acting On Their Own Behalf and On Behalf of Members of the Association,

Respondents.

On Writ Of Certiorari To Supreme Judicial Court Of The Commonwealth Of Massachusetts

AMICUS CURIAE BRIEF ON BEHALF OF PETITIONERS

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Citations marked A, followed by a page number, refer to Judge Duffy's decision in the New York *AOH v. Dinkins* case attached to the Petition for Certiorari.

Citations marked B, followed by a page number, refer to the decision of the Superior Court, attached to the Petition for Certiorari.

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Citations marked C, followed by a page number, refer to the decision of the Supreme Judicial Court for the Commonwealth of Massachussetts.

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CATHOLIC WAR VETERANS OF THE UNITED STATES OF AMERICA, INCORPORATED MEMORANDUM OF LAW AMICUS CURIAE IN SUPPORT OF APPELLANT'S MEMORANDUM OF LAW

INTEREST OF AMICUS PARTY

The Catholic War Veterans of the United States of America, Incorporated is a non-profit war veteran's organization incorporated under the laws of the State of New York in 1935, and chartered by the Congress of the United States on August 17, 1984. Its enumerated purposes, include, inter alia (a) to "preserve and protect and defend the Constitution of the United States . . . ". (b) "Commemorate" the wars of the United States, and the veterans who participated, live or dead; (d) Cooperate with other Veteran organizations in "common projects"; (j) "Encourage morality in . . . social, fraternal and all other phases of American life; (k) Promote the realization that the family is the basic unit of society; (l) "Increase our love, honor, and service to God . . . ".

In carrying out these purposes, the Catholic War Veterans sponsor or take part in, inter alia, public parades, processions, ceremonies, and memorial rites, often on public streets, and other public fora. Therefore, this case would not only impact on the public activities sponsored or participated in by this organization, and its First Amendment rights, but on the above enumerated purposes of this organization.

STATEMENT OF THE CASE

The decision of the Superior Court of the Commonwealth of Massachusetts, which was upheld by the Supreme Judicial Court of the Commonwealth, compelled the petitioners, South Boston Allied War Veterans Council, to include the Irish-American, Gay, Lesbian and Bisexual Group of Boston, along with their identifying banner, into their privately-sponsored

St. Patrick's Day/Evacuation Day Parade. As a result, the Veterans cancelled their 1994 parade and now appeal this decision. This "amicus" party adopts the statement of facts, and laws and statutes involved, as set forth in the appeal brief of the attorney for the South Boston Allied War Veterans Council.

The decision of the Massachusetts courts held that the Veteran's Parade had no expressive purpose, and so their speech was not involved. They then stated that the parade was "an open recreational event subject to the public accommodation law," *South Boston Allied War Veterans Council, et al. v. The City of Boston, et al.* (C9).

Despite the undisputed fact that GLIB's purpose for marching was to communicate their messages to the public in the Veterans' privately-sponsored parade, and against their wishes, the Massachusetts courts ruled that speech was not an issue here. The Superior Court decision handled this objection by just completely ignoring it. The Supreme Judicial Court did take note of it, but in a footnote (C14, footnote 19), dismissed its First Amendment implications based on two assumptions. It assumed that the First Amendment applied only if the objecting party had speech of their own which they wanted to express, and not solely an objection to showcasing another's unwanted message. They also assumed that somehow a public accommodation law car impose and mandate unwanted speech on an unwilling party, whereas a motor vehicle law cannot.

The Massachusetts courts also ruled that the Veterans had discriminated against respondents because of their sexual orientation. No evidence was ever presented, and there is none in the record, that in the forty-seven-year history of the parade the Veterans ever excluded any person based on his or her sexual orientation. Both Massachusetts courts attempted to get around this basic problem by stating that the Veterans' objection to GLIB's message constituted discrimination based on the sexual orientation of its members.

Finally, the Massachusetts courts bypassed the issue of free speech, and viewed this case as only involving freedom of association. As the dissenting opinion of the Supreme Judicial Court said, "As discussed above, the Veterans Council organizes the parade for expressive purposes: to entertain the hundreds of thousands of spectators who view the parade each year in celebration of St. Patrick's Day and Evacuation Day" (C23). These were the two themes and messages that the Veterans wished to express and celebrate by their parade – St. Patrick's Day and Evacuation Day – and the entertainment was the manner in which those themes were celebrated and expressed. But Judge Flannery's decision regarded the parade as akin to a social association such as a dance hall, (B24) or an expressive association (B25) (which apparently had no expressive purpose), rather than the association's expressive activity and speech. In doing so, he applied the criteria judging the right of a membership association to exclude applicants, rather than considering the First Amendment protection given to expressive activities and speech itself. This application of freedom of association criteria to a membership organization was criticized as flawed in the dissenting opinion as follows:

> "Infringements on the right not to associate are examined under strict scrutiny; 'Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.' *Roberts v. United States Jaycees, supra,* and cases cited. It is established, however, that, '[i]f a club seeks to exclude individuals who do not share the views that the club's members wish to promote,' the law may not require association."

To reiterate, the Veterans Council is the association, and the parade is their expressive activity – their speech. But even viewed as an association, the dissent noted that an association

may not be forced to either associate with or to showcase another party's ideas or messages to which it objects, or accept members that may impair the ability of the original members to express only those views that brought them together [see C21, C22 and C23].

ARGUMENT

POINT I

THE VETERANS' PERMITTED PARADE HAD A THEME AND MESSAGE, AND WAS PROTECTED SPEECH.

Basically, the same questions that are involved in this action were decided in *New York County Board of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358 (S.D.N.Y. 1993). In that case a homosexual group, "Irish Lesbian Gay Organization" (ILGO) applied for permission to march in New York's annual St. Patrick's Day Parade with their banner. They were refused admission by the AOH, the parade's sponsor and organizer, although the AOH maintained that individual members of ILGO could march in the parade *without a banner* as guests of various parade contingents (p. 362 of AOH decision, supra, and A9).

Eventually the case ended up in the United States District Court, where the Court ruled in favor of the AOH on the grounds that their First Amendment rights would be violated if they were compelled to include ILGO in their parade, and that a parade, as a form of speech or expression, cannot be a public accommodation.

The Court's decision in the aforementioned *AOH* case, supra, noted that the New York City Human Rights Commission did not cite a single case that held a parade to be a public accommodation. The Court said:

> "It is interesting to note that in determining the question as to whether a parade can be a "public

> accommodation," neither the Administrative Law Judge nor the New York City Human Rights Commission makes any reference to a judicial or administrative opinion in a case involving parades." (Id. at 364, and A13).

It is also interesting to note that Judge Flannery's decision also does not cite a single case holding that a parade is a public accommodation.

This question as to whether a private parade can be a public accommodation was, as previously stated, answered in the negative by the Federal District Court in the aforecited *AOH v. Dinkins* case. In so ruling, the Court made a detailed analysis of the leading cases in this area, as follows:

> "The main problem with the logic of the decision of the City's Human Rights Commission is that it starts the analysis at the wrong end. The first question that should have been considered is not whether the New York St. Patrick's Day Parade is a public accommodation, but whether the Parade and its message constitutes speech protected by the First Amendment guarantees of Freedom of Speech. Insofar as a parade constitutes protected free speech, it cannot be a public accommodation.
>
> "A parade is, by its nature, a pristine form of speech. *See Perry Educ. Assoc. v. Perry Local Educator's Assoc.*, 460 U.S. 37, 45 (1983); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969); *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 286-87 (D. Md. 1988). In parades, people gather together for the purpose of expressing their message. *See id.* The public thoroughfares of our nation are the public fora in which the issues of the day can be debated and where individuals seek to engage in basic expressive activity, such as parading. *Id.; Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (citing *Police Department of Chicago v. Mosley*, 408

U.S. 92, 94-96 (1972); *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939). *Every parade is designed to convey a message. Id.* As such, a parade organized by a private sponsor is the quintessential exercise of the First Amendment right of freedom of expression. *Id.* (Emphasis added).

"The First Amendment guarantees an individual the right to free speech, 'a term necessarily comprising the decision of both what to say and what not to say.' *Riley v. Nat'l Federation of the Blind of North Carolina*, 487 U.S. 781, 796-97 (1987). In exercising this right the message intended to be conveyed by a parade sponsored by a private organization is to be determined by the parade sponsor and not by the state or the city. *See Grayned*, F.2d 1197, 1201 (7th Cir., *cert denied*, 439 U.S. 916 (1978); *Invisible Empire*, 700 F. Supp. at 286-87. To hold otherwise would give local government the right of censorship over the thoughts and speech of the people. *Id.;* see also *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 10-11, 15-17 (1986) (state could not compel company to include in its billing a third party's message it disagreed with); *Wallace v. Jaffree*, 472 U.S. 38, 48-55 (1985) (First Amendment adopted to curtail power of Congress to interfere with individuals' freedom to "express himself in accordance with the dictates of his own conscience"); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (forcing newspapers to print candidates' replies to editorials is an impermissible burden on editorial control and judgment); *Sherber v. Verner*, 374 U.S. 398, 402 (1963) (government may "not compel affirmance of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold views abhorrent to the authorities"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1934) (state has no

power to force individual to profess any statement of belief)." (Id. at 366 and 367, A18,19).

This decision by Judge Duffy, and the supporting cases, make it clear that every parade expresses a message of some sort, and every parade is a pristine form of speech. As such, parading is a "basic expressive activity," and "a parade organized by a private sponsor is the quintessential exercise of the First Amendment right of freedom of expression."

To arrive at their decision that this Parade was not an expressive activity, but rather a public accommodation, the Massachusetts courts ruled that the Veterans' Parade had no expressive purpose, and so was not protected speech. However, the very name of the Parade expresses its message and theme. Its expressive purpose was to celebrate St. Patrick's Day and Evacuation Day, and what these events meant to them. Its theme and expressive purpose was obviously to honor St. Patrick, and celebrate those cultural, religious and patriotic themes indicated by the very name of the Parade. The Massachusetts courts closed their eyes to this obvious expressive purpose by examining the makeup of the individual units marching. They acted like the blind men who were asked to describe an elephant. One, grabbing the tail, said it was a snake. Another, grabbing its leg, said it was a tree. Another, feeling its side, said it was a wall. Another, touching its tusk, said it was a spear, etc. Of couse, it was an elephant. Like the blind men, the Massachusetts courts refused to look at the Parade as it was, but analyzed its components in order to avoid admitting what it was: an expressive activity celebrating stated themes. This, of course, is protected speech. The Massachusetts courts, however, refused to recognize the forest because the leaves were in the way.

The fact that there is diversity in a parade does not mean that the public at large can participate, or that the Veterans do not exercise their right to select or reject applicants. Nearly all parades are composed of diverse groups of marchers who are representative of different organizations. However, on the occasion of the parade, they are all participating in the theme and expressive purpose of the parade. And it is the parade's sponsors who have the right to determine that theme, its

meaning to them, what messages are in harmony with it, and its composition – not the state. In doing so, the parade's sponsors have the right to exclude any group that the sponsors believe send a message contrary to their own theme or message, or who detracts from it, or which is just unwanted. And they should have the right to do so without being hauled before a court or state agency and forced to explain or justify their speech and expressive activities.

Judge Flannery's decision states: "Participation in the Parade is not limited on the basis of similarity of viewpoints" (B24), a justification echoed by the Supreme Judicial Court (C7). His statement is ambiguous, if not misleading, and is completely irrelevant. Viewpoints about what? No parade is composed of marchers who all have uniform interests in their daily lives, or have similar viewpoints on all the issues of the day. If this was a litmus test, then no parade would have First Amendment protection, except perhaps a KKK parade. If this was a criterion, then no expressive activity, including most parades, would have First Amendment protection. To have First Amendment protection, all parades would have to be a March of the Clones, or at least a March of the Clans.

What is relevant here is not whether a parade is composed of units from various sections of the community, but whether these units send out a message that the sponsors who shape the parade object to, or decide would not enhance their parade and their own message, theme, or entertainment value. In a private parade only the sponsors have the right to make this decision.

Judge Flannery's decision states: "The Parade . . . is composed of diverse groups espousing myriad themes and values" (B24). While it, like all parades, may be composed of diverse groups, the Parade itself does not celebrate myriad themes and values. It celebrates what its sponsors say it does, St. Patrick's Day and Evacuation Day, a fact which everyone in the City of Boston seems to be aware of, except apparently Judge Flannery and the Supreme Judicial Court.

The fact that marching units may incidentally communicate a message of their own at the forebearance of the sponsors does not mean that the sponsors of the parade have no

message to communicate themselves, or that they can not exclude messages contrary to their own overarching theme or message, or which, in their view, detract from or are not appropriate to their theme.

Further, there is nothing in the Constitution that says that, if an expressive activity or speech encompasses many themes, it is not sufficiently focused to qualify for First Amendment protection. Messages are speech. And if a parade has one message, or ten messages, or a hundred messages, it still constitutes speech, whether focused or not. A surfeit of messages or speech does not change its nature to non-speech. But, as a matter of fact, this Parade had just two themes or messages, both of which are indicated by the Parade's very name. Any other messages that individual units may have expressed in the Parade either reflected those traditional religious and social values that the Veterans testified they were celebrating, or were part of the entertainment, a common purpose of most parades, or else were allowed by the Veterans at their forebearance as being merely incidental expressions not contrary to their own themes and messages. These kinds of incidental messages take place in nearly all privately sponsored parades.

Further, contrary to Judge Flannery's assertion, this Parade did not espouse "myriad" values. As Judge Flannery's decision itself noted, the Veterans asserted that their Parade "expresses traditional religious and social values" (B3). Nowhere does Judge Flannery point to any theme in the Parade which is *contrary* to traditional religious and social values. The Veterans testified that, in celebrating St. Patrick's Day and Evacuation Day, they were expressing and celebrating "their traditional religious and social values," which in their view these themes represented. The Massachusetts courts point to nothing in the record to contradict this except that participants, as in nearly all parades, come from various elements of the community, and may incidentally project a message of their own.

The Supreme Judicial Court upheld Judge Flannery's absurd conclusion that this Parade was not focused "on a specific message, theme, or group – perhaps a Temple or

Parish congregation" (B24), and so "it is impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment" (B25). They obviously felt that St. Patrick was not a theme of the St. Patrick's Day Parade.

The Supreme Judicial Court noted that the defendants pointed to evidence in the record that the Parade did have a message, but summarily dismissed this by stating that all the evidence was before the trial judge "when he made his decision, and we assume that he considered all the evidence" (C14). The Court said that "on our own review of the record, we could not conclude that the findings of the judge were clearly erroneous" (C4). This statement defies both reason and legal precedent. The finding of the Massachusetts courts was that the Parade contained "myriad themes and values" (B24). From this, the Massachusetts courts concluded that it contained no themes or values. It also concluded that the Parade, which had no theme or message, actually did have messages, but they were not sufficiently focused to constitute speech. If this rationale is upheld, the protection now afforded free speech by the First Amendment would no longer be certain. To qualify for First Amendment protection, speech or expressive activity would have to be sufficiently isolated from other speech, and would have to be sufficiently focused in the view of the governmental judge of this matter. To subject speech to such a subjective standard, as to whether it is sufficiently focused so as to constitute speech, would be to subject all speech to the subjective vagaries, whims and prejudices of governmental officials, whose thinking may not be sufficiently focused on the First Amendment to make such a subjective and amorphous determination. It, in effect, removes the iron-bound protection which speech has heretofore been given by the First Amendment.

As previously noted, the very name of this Parade expressed its theme and message. As such, it is self-evident, even without the uncontradicted testimony of the Veterans as to what it represents. It, of course, is a celebration of a religious/cultural feast day, together with a patriotic holiday,

and the penumbra of traditional values that these days represent to the Veterans who sponsor this celebratory parade.

To the Massachusetts courts, however, contrary to common knowledge, common sense, and the uncontradicted testimony of the Veterans, this Parade was basically meaningless – that it was just an exercise in sound and fury signifying nothing – it had no "expressive purpose" (C15).

The decision of the Supreme Judicial Court stated that: "The dissent suggests that the finding of the judge that the parade did not have an expressive purpose was clearly erroneous because the parade provides entertainment to the spectators. Aside from the fact that the defendants themselves did not assert this as evidence of an expressive purpose, we are puzzled by the dissent's assertion, without citation, that the mere provision of entertainment would transfer the parade into an expressive event" (C14, footnote 10).

This is not a complete nor totally accurate account of what the dissent said. The dissent said: "The Veterans Council obtains a license, collects funds, and privately organizes the St. Patrick's Day – Evacuation Day Parade each year. They do so knowing that their efforts will provide entertainment to the hundreds of thousands of spectators who line the streets of the South Boston section of Boston to watch *in celebration* of St. Patrick's Day and Evacuation Day" (C21), (emphasis added). The majority's restatement of the dissent conveniently ignores that part of the statement that notes that the entertainment is "in celebration of St. Patrick's Day and Evacuation Day." And, of course, a celebration of something that has obvious symbolic meaning is an expressive activity and speech. The majority's restatement, however, creates the illusion that the Parade is not a celebration of anything, but merely entertainment for entertainment's sake, and is not meant to celebrate meaningful events dear to the hearts of both the sponsors and spectators. The Parade, with its bands and entertainment, is the method that the sponsors use to celebrate and express their sentiments, values, loyalties, and pride. And, as the Court said in *New York County Board of Ancient Order of Hibernians v. Dinkins:* "The manner and means by which the

message is conveyed is also a matter of constitutionally protected free speech," 814 F. Supp. at 367 (A21 – incomplete cite). Parades, bands and entertainment in celebration of an event, then, are also protected speech.

In fact, even entertainment for entertainment's sake is also protected speech, contrary to the majority's suggestion. Even "string bands," "fancy clubs," "comic clubs," and other forms of entertainment in parades have been held to be protected speech. (*Tacynec v. City of Philadelphia*, 687 F.2d 797 (1982). As the Court said in *Tacynec, id.*, at 796:

> "The City of Philadelphia argues that because the plaintiffs' activity does not convey an overtly political or ideological message, it is not "speech" and therefore is not entitled to First Amendment protection. However, the Supreme Court has made it clear that '[e]ntertainment, as well as political and ideological speech, is protected; –' "

This included "non-obscene nude dancing", "human cannon-ball performance", "adult films", the musical production 'Hair', and "folk music" (See *Tacynec*, supra, at 796). The Court went on to say:

> "Because the Mummers-type string band performance is a form of expressive entertainment, we hold that it is covered by the First Amendment."

Sponsors of a private parade may celebrate and express their theme as they wish, and even with groups that the Court deems to be irrelevant to the Parade's theme, including entertainment groups such as "Joey Clowns" and the "Cycling Murrays" (B7). And they should not be forced to explain and justify their decisions as to the composition of the Parade, and how it expresses or celebrates their themes, values, and expressive association. Just as the City cannot go into "content," neither can the Court.

Further, this "entertainment" issue was raised at trial. In fact, the trial court itself made it an issue by questioning the relevancy of entertainment groups to any message or speech

(B6, B7). But, contrary to the majority's statement, it was also asserted by petitioners in their original memorandum of law to the trial court and in their appellate brief (p. 19), both of which cited the above-cited *Tacynec* case. It was also cited in the amicus brief submitted to the Supreme Judicial Court by the Catholic League for Religious and Civil Rights, also in support of the position that entertainment is protected speech. Moreover, raised or not, it is case law, and so is applicable.

In this day and age of protests, there is a tendency to assume, perhaps subliminally, that protected speech must be controversial, political, or in protest of something. This, of course, is not the case. Speech or expressive activity celebrating something receives the same First Amendment protection as speech opposing something.

And a Parade honoring St. Patrick and traditional values is just as much protected speech as a public protest against what the organizers oppose or consider to be morally and socially wrong.

The gardener who celebrates his love of flowers is making as much of a statement as the gardener who proclaims his hatred of weeds.

The decision of the Massachusetts Courts, then, that this Parade was not an expressive activity and protected speech is divorced from the reality of the real world, as well as from legal precedent. The First Amendment should not be vulnerable to such unreal and convoluted rationalizations.

POINT II

THIS PARADE WAS NOT OPEN TO THE PUBLIC, AND SO WAS NOT A PUBLIC ACCOMMODATION.

After finding that this Parade had no expressive purpose, Judge Flannery went on to rule that the Veterans did not determine who would march in the Parade. His decision states:

> "Given the lack of selectivity exerted by the Veterans over the Parade participants and sponsors,

> as well as the Parade's historical roots, I conclude that the Parade is a public event." (B9).

As a further argument that the Parade sponsors did not exercise selectivity, Judge Flannery says:

> "Indeed, since 1947 the only groups that have been excluded from the Parade besides GLIB have been the Ku Klux Klan and ROAR (Restore our Alienated Rights). Neither of these groups, however, is protected under M.G.L. c. 272 ___92A and 98." (B7).

Again, Judge Flannery muddies the water. The question at issue is whether the Veterans exercised control over who could march and who could not. It is irrelevant to the control and selectivity issue as to whether these groups were protected under the state statute or not.

Moreover, Judge Flannery also misstates the facts and the trial testimony. The majority decision itself noted that the Veterans also excluded the Massachusetts Right to Life group, and a truck carrying anti-homosexual signs. It further noted that NORAID was prevented from marching until it altered its message (C8, footnote 10).

If since 1947 only four groups besides GLIB were excluded from the Parade, and another forced to alter its message before it was admitted, there is an obvious reason. None of the other participating groups had themes which the Veterans considered antithetical to the theme of their Parade, or which injected unwanted controversial issues into it.

How did the Supreme Judicial Court of Massachusetts deal with the obvious fact that the Veterans had exercised control over their parade, and selectivity as to participants and messages. It just arbitrarily dismissed its import. It said: "Assuming this to be true, we perceive no legal relevance of this fact to the findings of the judge or the conclusion we reach" (C8, footnote 10). The fact that the Veterans did not allow certain segments of the public into their parade, screened out controversial or unwanted messages, and barred groups that it found were inappropriate to the theme of their Parade – to the Massachusetts Courts, all of this was not relevant as to whether the Veterans exercised control and

selectivity over their Parade. The Massachusetts Courts here have, in effect, said: "Don't confuse us with the facts."

The trial testimony of John Hurley was that 90% to 95% of the participants in the Parade marched before (Trial testimony of John J. Hurley, Trial Transcript page A-380, cited in Petition for Writ, page 9, footnote 1). This alone indicates that the Parade was not open to the public. Certainly, if it was, it would not be primarily composed of the same groups year after year.

Further, the trial court simply ignored the long-standing procedures for admitting applicants to the parade, including even previous participants. As the trial court's decision noted, "Applications for participation in next year's Parade are sent to all previous participants. Those who call to inquire about participation in the Parade are sent applications . . . " (B7, B8). Further, the trial court ignored the fact that questions about newly-formed groups were concerns of the Veterans (Tr. A-250, 7-24), and, as previously noted, some were rejected because they were controversial, objectionable to the Veterans, or deemed not appropriate to the theme of the Parade, and the message that the Veterans Council wished it to project.

Further, as pointed out in petitioners' brief to the Supreme Judicial Court, the Veterans have a written Parade Registration Form. The form is reviewed by the Council. The Veterans have a history of inviting groups through written acceptance. (Trial Transcript is referred to herein as Tr). (Tr. A-245 (8-22), A-292 (5-23), A-323 (8-11), A-379 (11-24), A-380 (1-13)).

The trial court's attempt to turn a private parade into a public accommodation had to resort to misstatements of fact, a wealth of irrelevancies and unreal and ludicrous arguments. It stated that, "The Veterans do not generally inquire into the specific messages or views of each applicant." [B8] As pointed out, 90% to 95% of participants had previously marched, and so were familiar to the Veterans Council. However, the Veterans said that questions about new groups were a concern of the Veterans (Tr. A-250, 7-24). Few, if any, parade sponsors, however, have the wherewithal or time to

have a detective agency develop a security profile on each participant or unit in their parade. As in all parades, the non-acceptability of a group is usually determined by its proclaimed message, or the message their name may communicate, or public knowledge of what they represent.

The trial court also said:

> "In addition, some groups participate in the Parade without submitting an application to the Veterans Council. For instance, in 1993, the Boston Bruins did not apply to the Veterans Council, but simply showed up at the Parade and marched. Other groups gained entrance by making a contribution to the Parade rather than filling out an application form. Thus, the procedures for admittance into the Parade are not uniformly applied." (B8).

As to the few groups who may show up without a registration form and are allowed to march, Mr. Hurley testified that on the day of the parade he makes on-the-spot calls for the Council (Tr. A-375 (3-24), A-376 (1-14), A-417 (2-24), A-418 (1-24), A-419 (1-14)). When a citizen showed up in a truck with anti-gay posters, Mr. Hurley turned the truck away (Tr. A-376 (15-24), A-377 (1-11)). Superintendent Maloney of the Boston Police Department confirmed this (Tr. A-234 (6-24), A-235 (1-7)). As to a few members of the Boston Bruins showing up and marching in the 1992 parade, Hurley testified that he allowed them in as a favor to the Mayor (Tr. A-366 (4-21)).

Judge Flannery also pointed to the fact that "some AFL-CIO marchers carried signs which read 'Boycott Miller Beer' " (B24), conflicting with the various bars and pubs which sell such products. First of all, signs or messages in a parade do not have to be internally consistent. It is the sponsors who have the right to decide whether they are appropriate to *their* own theme, and not whether all individual units agree with each others' message which they may communicate. The Masons and the Knights of Columbus may march in a privately-sponsored patriotic parade without the sponsors losing their First Amendment protection. However, Judge Flannery's decision ignored the facts on even this point. As to the

"Boycott Miller Beer" sign, Mr. Hurley testified he didn't even know they had a sign of that nature and, if he did know, he would have ordered it removed (Tr. A-344 (15-24), A-245 (1-4)).

The record is clear then that this Parade is not an "open recreational event." Participants must apply and be approved by the Council, usually weeks in advance. Only those who are listed on a printed roster may participate (p. 10 of petition), with the occasional exception of a last-minute applicant, who still must receive permission from an authorized representative of the Veterans Council. And, as the record shows, the Boston Police Department would evict any person or group who tried to march without the Veterans' approval (p. 9 of petition, footnote 2).

It is clear here that the findings of fact as to control and selectivity were contrary to the uncontroverted evidence, and should be reversed.

And in a parade of over 10,000 marchers, the trial court could not point to a single instance where a person or group ever marched without the Veteran's permission.

As the Veteran's brief before the Supreme Judicial Court brought out:

> "What the trial court did here was to take the few *authorized* exceptions to the admission's rule, and treat them as the usual way participating groups were admitted. The trial court simply ignored the procedure of being invited, being accepted, and the firm control the Veterans exercise over the messages and offensive themes." (Emphasis added.)

The trial court tried to portray a picture where any member of the public could show up at the Parade and march. This scenario is completely at variance with reality.

As noted, Judge Flannery's decision is not able to point to one First Amendment case in support of his ruling involving a parade or other private expressive event. He is reduced to suggesting that the St. Patrick's Day/Evacuation Day Parade is not really a parade at all. He says: "In the instant case, the Parade is more akin to a 'social association' " (B24)

(*Dallas v. Stranglin,* 490 U.S. 19 [1989]), which involved a dance hall.

The attempt by Judge Flannery to liken a parade to a dance hall only illustrates the complete absence of any cases in this area in support of his decision. Further, the *Dallas* case held that people *could be excluded.*

Judge Flannery also based his decision on the fact that the Parade celebrates a public holiday. (B8 and C13, footnote 17). This, too, is irrelevant. A private group may celebrate anything it wants, including what has been declared to be a public holiday, without losing its private status and First Amendment protection, and without becoming a public accommodation open to the public at large. As the Court ruled in *Gay Veterans Ass'n Inc. v. American Legion,* 621 F. Supp. 1510 (at 517):

> "Plaintiff's argue that the American Legion parade is a public forum because its purpose is to celebrate a public holiday, Veterans Day, in a public street. This, however, does not turn a private parade into a public forum. Under New York law, the sponsorship of parades to celebrate Veterans Day is not an exclusively public function."

The decision of the trial court (B24, 25) and the Supreme Judicial Court (C13) both try to distinguish this case from the *AOH v. Dinkins* case (supra) by arguing that the Boston Parade had a variety of participants who communicated diverse messages and, further, it celebrated a public holiday. The Supreme Judicial Court said, "We also note that the New York parade celebrates only St. Patrick's Day, while the Boston parade celebrates, in addition, Evacuation Day. . . . It was partly on this basis that the judge characterized the Boston parade as a 'public event.' " (C13, footnote 17). As noted, this is error (see *Gay Veterans*, supra). As the decision was based on the weight of a combination of facts, this alone is reversible error.

Judge Flannery also based his decision on the longstanding history of the Parade (B8) (C13, footnote 18), its large size (B9), its airing on television (B9), and diversity of participants (B9).

These were all issues raised in *AOH v. Dinkins,* supra. As was pointed out in Judge Duffy's decision in the AOH case, supra, "The St. Patrick's Day Parade has been a fixture of the New York City scene for well over two hundred years. The first New York St. Patrick's Day Parade took place in 1762" (A6). Further, as Judge Duffy noted that:

> " . . . it is abundantly clear that some of the marchers participating in the St. Patrick's Day Parade are neither members of the AOH nor members of the Roman Catholic Church. . . . The Parade marchers generally number in the vicinity of 150,000, with between one and two million onlookers. The New York St. Patrick's Day parade is carried by at least one local television station and quite often parts of it are shown on national television.
>
> The St. Patrick's Day Parade is billed as the largest annual civilian Parade in the world. The Parade celebrates, *inter alia,* freedom and Irish culture and heritage. Traditionally, elected officials have marched in the Parade regardless of their religious or political affiliation or of their position on any issue. Joint Statement of Uncontested Facts ("Jt. Stmt.") at para. 13" (A7).

As for size, the New York Parade has been seven to fifteen times larger than the Boston Parade, has longer historical roots, is televised, often, in part, on national television, is a *civilian* parade celebrating more than one theme (the Parade celebrates, *inter alia,* freedom and Irish culture and heritage), is composed of diverse groups, bands, colleges, professional groups (nurses, firemen, etc.), and elected officials "regardless of their religious or political affiliation or of their position on any issue."

It is clear that, in trying to find a peg to hang its decision on, the trial court repeatedly misstated the Veterans' arguments, claims, and the factual situations surrounding this event, as well as misinterpreting law and legal precedents. The decision that speech was not involved in this Parade, and that it was open to the general public to participate in, is

clearly not in accord with reality, nor with the testimony and record.

Although it was not an issue in the District Court action, *South Boston Allied War Veterans v. City of Boston,* supra, Judge Wolf noted that the 1995 Parade incorporated "the Veterans' usual themes of honoring St. Patrick and celebrating the traditional Irish family and family values" (p. 1), and noted that these themes "have been the themes of the previously litigated Parades" (p. 21).

The attempt by the trial court to obscure the obvious fact that this Parade had an expressive purpose and theme, and so was protected speech, and that the Veterans exercised control and selectivity over who could march, and to exclude unwanted messages, was more than a classic example of legal obfuscation and obscurantism. It was Kafkaesque.

POINT III

ONE CANNOT BE FORCED TO SHOWCASE ANOTHER'S VIEWPOINTS OR IDEAS.

It is an uncontroverted matter of record that GLIB's participation in this Parade not only would communicate a message, but that this was the purpose of GLIB for marching (B3).

Despite this fact, the Massachusetts Courts ruled that speech was not an issue here. They refused to recognize that the issue of free speech is involved, whether speech is prescribed or proscribed.

The trial court handled this objection by simply not addressing it. The Supreme Judicial Court did take note of it, but dismissed its First Amendment implications based on two erroneous assumptions (C14, footnote 19). It said the private automobile of a New Hampshire resident could not be characterized as a public accommodation. This distinction presupposes that a public accommodation law can override the First Amendment and impose unwanted speech on an unwilling party, whereas a motor vehicle law cannot.

Its decision also indicated that the First Amendment protection against compelled speech only applied here if the

Veterans could "demonstrate that they were exercising their First Amendment rights . . . " (C14, footnote 19). This is erroneous.

The U.S. Supreme Court has consistently ruled that one cannot be forced to foster, endorse, proselytize or subsidize a view with which he or she disagrees, under long-established First Amendment doctrine. The Supreme court unmistakenly ruled out such coercion in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628. The court said: "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from *all* official control." Id. at 642, 63 S. Ct. at 1187 (emphasis added). It further said that the state has no "power to force an American citizen to publicly profess any statement of belief."

Perhaps the landmark case on this issue is *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S. Ct. 1428, 1435, 51 L.Ed. 2d 752, which involved the aforementioned New Hampshire motorist. In that case a member of Jehovah's Witnesses objected to being compelled to exhibit on his vehicle license plates the State motto of New Hampshire, "Live Free or Die." The Court ruled that he did not have to do so, and that government may no more prescribe messages than proscribe them. The Court said:

> "We begin with the proposition that the right of freedom of thought by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education v. Barnette* 319 U.S. 624, 633-634 (1943); *id,* at 645 (Murphy J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." *Id,* at 637. This is illustrated by the recent

> case of *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. We concluded that such a requirement deprived a newspaper of the fundamental right to decide what to print or omit:" (at 714) (see also *Wallace v. Jaffree,* 472 U.S. 51).

It is undeniable that to compel another to foster, or aid and abet, or proselytize, or to provide a platform, or to associate with a view that is in conflict with one's own religious, social, or moral views invades "the sphere of intellect and spirit which it is the purpose of the First Amendment to our constitution to reserve from *all* official control," as stated in *West Virginia v. Barnette,* supra. (Emphasis added.)

As was said in *International Ass'n. of Machinists v. Street,* 367 U.S. 740 815 Ct. 1, 784, 6 L.Ed.2d 1141, (quoting Thomas Jefferson), "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." In the instant action, the Veterans are not only being forced to spend time and money to provide a platform to showcase a theme which they strongly oppose, but also to publicly associate themselves and their own values and messages with it. In the aforecited words of Thomas Jefferson this is "sinful and tyrannical," not to mention a violation of the First Amendment rights of the sponsors.

POINT IV

THE ISSUANCE OF A PARADE PERMIT BY OPERATION OF LAW RESERVES A PUBLIC FORUM TO THE EXCLUSIVE USE OF THE PRIVATE PERMIT HOLDER

As far as we are aware there are no cases that grant a party the right to demonstrate or march in an area granted by permit to another party's separate event. As was stated in *Sanders v. United States,* 518 F. Supp. 728, 730 (D.D.C., 1981), *aff'd without opinion,* 679 F. 2d 262 (D.C. Cir. 1992). (Emphasis added)

> "The court finds that the confusion and disorder that could be caused by all single, peaceful intrusions is significant enough to support defendants' policy of excluding such intrusions. Secondly, and more fundamentally, is the interest in guaranteeing citizens the right to participate in events or demonstrations of their own choosing without being subject to interference by other citizens. *A physical intrusion into another event for the purpose of interjecting one's own convictions or beliefs is by definition an interference, regardless of how insubstantial or insignificant it might appear.* As such, it is an interference with the rights of other citizens to enjoy the event or demonstration in which they have chosen to participate, *and in an area reserved for them.*"

The court in *Sanders* upheld the arrest of a single intruder who sought to peacefully intrude upon another's event for which a permit had been obtained.

Even when a true public accommodation such as a restaurant, or a room therein, is reserved for a private party it is no longer a public accommodation during that time, and the public would not be entitled to enter during the time it is so reserved. The same is even more true of a public forum reserved by permit for a private group.

Another case upholding the *Sanders* reasoning is *Bishop v. Reagan-Bush '84 Committee,* 635 F. Supp. 1020, 1023, 1024 (S.D. Ohio 1986), which held that opposition signs could be removed from a permitted event.

POINT V

THERE WAS NO EXCLUSION OF ANYONE FROM THE PARADE BASED ON THEIR SEXUAL ORIENTATION. THEREFORE, THE MASSACHUSETTS PUBLIC ACCOMMODATION STATUTE IS NOT APPLICABLE HERE.

By their own testimony, GLIB wanted to march in order to make a statement about homosexuality and to show their

support for the homosexual group that was seeking to participate in the New York St. Patrick's Day Parade.

In this case there has been no testimony that members of GLIB were barred from this Parade because of their sexual orientation.

It is their propaganda that was objected to by a private group unwilling to showcase another's unwanted message. No one ever prevented anyone from marching in the 47 year history of this Parade because of their sexual orientation. Note that GLIB's self-proclaimed purposes for marching had nothing to do with honoring St. Patrick, nor celebrating Evacuation Day, which are the themes of the Parade.

As the dissent in the decision by the Supreme Judicial Court noted, "if the Veterans Council excluded GLIB because of its message. . . . then the statute was not violated" (C24). The dissenting opinion stated that the trial court's decision and order resulted in 'mandating speech [the Veterans Council] would not otherwise make', and is thus content based regulation. *Riley,* supra" (C20).

What Judge Flannery did was to confuse messages and propaganda with sexual orientation. He states:

> "In 1993, the Veterans again denied GLIB permission to participate in the Parade, asserting the decision to exclude groups with sexual themes merely formalized that the Parade expresses traditional religious and social values. Exh.43." (B3).

He then states:

> "The Defendant's final position was that GLIB would be excluded because of its values and its message, i.e., its members' sexual orientation. Tr. of Closing Arg. pp. 43, 51-52 (Nov. 23, 1993)". (p.4., footnote 5); (B4, footnote 5).

Here Judge Flannery equates the "values" and "messages" of the would-be marchers with their "sexual orientation". No one has inquired into the sexual orientation of any marchers. This rationale of the trial court was noted by the Supreme Judicial Court without comment, or criticism (C5 & 6, and footnote 8 on C6). Contrary to what the Massachusetts

courts hold, excluding GLIB "because of its values and its message" is not the same as excluding it because of the sexual orientation of their members. There may be, and probably are, many homosexually oriented people who would disagree with the message GLIB wished to communicate by marching, just as there are probably many heterosexuals who would support GLIB's message. Messages and ideas are not the same thing as "sexual orientation" and cannot be equated. To say that they are is a judicial version of the Alice-in-Wonderland statement: "When I use a word it means just what I choose it to mean . . . neither more nor less."

POINT VI

THE LOWER COURT'S DECISION WAS AN ATTEMPT TO IMPOSE CONTENT-BASED ADDITIONS AND ALTERATIONS TO THIS PARADE AND ITS MESSAGE, AND AS SUCH IS ABSOLUTELY FORBIDDEN BY THE FIRST AMENDMENT.

That Judge Flannery's decision is addressed to and based on expressive content rather than the sexual orientation of the marchers is made very clear, not only by his failure to cite anyone excluded from the Parade because of their sexual orientation, but also because he flatly asserts that content is what is involved here. He says:

> "Several cases, although they are distinguishable on other grounds, illuminate the invalidity of the Veterans' purported reasons for excluding GLIB. Excluding all sexual themes not only contravenes the First Amendment's prohibition on content-based restrictions, see *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 537-38 (1980) (prohibiting discussion of an entire topic violates the First Amendment), but is a form of discrimination itself. – Consequently, the Veterans' exclusion of GLIB under the guise of excluding all groups with sexual themes violates the public accommodations law's prohibition on sexual orientation discrimination." (B4, footnote 6).

Thus he turns the First Amendment completely on its head to make it compel what it actually forbids. The cases that he cites here are completely inapposite.

The situation in the *Con Edison* case is comparable to the present action. Con Edison was asked by a private group to open its billing envelopes to contrasting views (p. 532). It refused. The Commission then ruled that utilities could not use "bill inserts to discuss political matters, including the desirability of future development of nuclear power."

In overruling this decision, the U.S. Supreme Court in the *Con Ed* case said:

> "As a consequence we have emphasized that time, place, and manner regulations must be applicable to all speech irrespective of content. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 209 (1975); see *Carey v. Brown,* ante, at 470. Governmental action that regulates speech on the basis of its subject matter slip[s] from the neutrality of time, place, and circumstance into a concern about content.

His decision, then, is based on the egregiously erroneous views that a person's "sexual orientation" and his or her views are one and the same thing; that private groups cannot exclude sexual themes from their speech; and that a ruling against government interference with the free speech and expression of private groups, actually supports giving government the right to interfere with such speech; and further that these restrictions on governmental interference are really applicable to private citizens, the very parties to whom these restrictions are meant to protect.

In trying to explain away the Veteran's speech (which is the Parade itself and what it symbolizes) Judge Flannery has arbitrarily decided that it is he who has the right to determine what the composition of the Parade should be; how narrowly or broadly the Parade's theme must be expressed or focused (B24); how similar the participants' viewpoints must be (B24); how monolithic a Parade must be, including how diverse the participants can be (B6, 7 and 24); how circumscribed the alleged messages of the marchers must be (B24, 25); that the sponsors of a Parade cannot exclude sexual

themes (B4, footnote 6); that "values" and "message" relating to sexual orientation cannot be excluded (B4 footnote 5, & 31), and other areas relating to the content of the theme, messages, and values expressed by the Parade.

He even assumes to speak for the Veteran's,, saying: "A proper celebration of St. Patricks and Evacuation Day requires diversity and inclusiveness. . . . " (B24). Judge Flannery ends his rationale with a bizarre flourish. He says:

> "History does not record that St. Patrick limited his ministry to heterosexuals or that General Washington's soldiers were all straight. Inclusiveness should be the hallmark of their Parade." (B28).

However, it is the Veterans and not Judge Flannery who should have the right, under our Constitution, to determine what "the hallmarks of their Parade" should be.

As Judge Duffy said in the *New York AOH* case, supra:

> "Such activity (telling citizens what they must think and how they must express themselves) is something one would expect from the Thought Police described by George Orwell." (A24)

POINT VII

THE DECISION OF THE MASSACHUSETTS COURTS ALSO VIOLATED THE APPELLANTS' RIGHTS OF FREEDOM OF EXPRESSIVE ASSOCIATION.

Again we emphasize that this Parade is the Veterans production, their assembled performance – their speech. However the Massachusetts public accommodation statute is not applicable here even to expressive associations. It is only applicable where commercial activity is involved (see, *Invisible Empire KKK v. Mayor et al. of Thurmont,* 100 F. Supp. 281 (D.Md. 1988) at 289.

Further, as the decision in *Roberts v. United States Jaycees,* 468 U.S. 609, said, infringements, not on speech, but on the right of association "may be justified by regulations adopted to serve compelling state interests [that are] *unrelated to the suppression of ideas* . . . " (468 U.S. at 623). (Emphasis added). That is clearly not the case here.

And as previously noted, this Parade is speech, and not merely an association gathered together for expressive purposes. It is the Veterans expression. As such, its First Amendment protection is not subject to a balancing of interests.

CONCLUSION AND SUMMARY

This Parade was not a membership organization. The Veteran's Council was the membership organization, and the Parade itself was its speech – its production.

And, it is obvious that this Parade had a theme and expressive purpose, which was stated and communicated by its very name. It was a Parade in honor of St. Patrick, patron Saint of Ireland, and also in celebration of Evacuation Day, and the penumbra of "traditional religious and social values" which the Veterans testified that this day, and the Parade celebrating it, represented to them (B3).

Honoring St. Patrick, and celebrating what he means to the Irish people and their values, religion, and culture, is certainly a message.

The First Amendment is not negated because a parade or production has multiple messages. Speech is speech, and is protected whether it has one message or one hundred messages.

There is no such standard that private speech must be sufficiently focused to enjoy First Amendment protection. This is Judge Flannery's invention, and it would decimate the First Amendment rights of all of us. This criterion is an unprecedented limitation on First Amendment protection of free speech. There is no legal precedent for it, and it would, if not terminate the protection given to speech, at least have such a chilling effect on free speech, that the practical result would be the same.

Further, the Massachusetts courts, having recognized that this Parade contained myriad messages, cannot logically say that it had no message, as it did.

Moreover, the record shows that Veterans did have a policy of selectivity, and a history of excluding unwanted themes and messages from their Parade. However, the

Supreme Judicial Court of Massachusetts just arbitrarily dismissed its import, saying it had "no legal relevance –" (C8, footnote 10).

Further, the trial court decided the Parade was a public accomodation because of its lack of "selectivity", and that it celebrated a public event which was a public holiday (C13, footnote 17, B8, B24). And, as the trial court indicated that its decision was based on the combined effect of these two findings, this alone is reversible error.

Further, aside from the issue of the Veteran's own speech, this case still involved the issue of free speech. The First Amendment absolutely forbids compelling someone to associate with, display, or showcase another's message against its will no matter what state law attempts to compel it. To do so is far more tyrannical and violative of the integrity of a person than banning their speech. It violates their conscience and personal integrity. In the aforecited words of Thomas Jefferson it "is sinful and tyrannical".

Moreover, this Parade is the speech of the Veterans Council. But even if viewed as a membership organization, their application of the law was erroneous. As the *Roberts* case, supra, said, infringements on the right of association may be justified only if they are "unrelated to the suppression of ideas" (468 U.S. at 623). That is not the case here.

It is also constitutional law that the issuance of a parade permit by operation of law reserves a public forum for the exclusive use of the private permit holder. The public highways are a traditional public forum.

But even if a true public accommodation, such as a restaurant, or a dining room therein, is reserved for a private group, outsiders cannot intrude during the time it is reserved. This is even more so of a public forum reserved by permit for the use of a private organization.

Also, the trial court could not point to anyone every being excluded from this parade because of their sexual orientation. As the dissent noted, the trial judge, in order to apply the state statute to this Parade "equates excluding a group on the basis of its message or values with exclusion on

the basis of its members sexual preference –. This is a clear error" (C24).

Finally Judge Flannery's decision was a blatant attempt to impose content – based additions and changes to this Parade. He said that "Excluding all sexual themes – is a form of discrimination itself" (B4, footnote 6). This is a clear error. He assumes to speak for the Veterans, saying, "A proper celebration of St. Patrick's Day and Evacuation Day requires diversity and inclusiveness –" (B24).

He concludes his decision by stating:

> "History does not record that St. Patrick limited his ministry to heterosexuals or that General Washington's soldiers were all straight. Inclusiveness should be the hallmark of their Parade" (B28).

However, if the First Amendment means anything, it is the organizers of this Parade who have the right to determine what "the hallmark of their Parade should be".

To repeat the words of Judge Duffy in the *AOH v. Dinkins* case, supra:

> "Such activity (telling citizens what they must think and how they must express themselves) is something one would expect from the Thought Police described by George Orwell" (A24).

Therefore, The Catholic War Veterans of the United States of America, Incorporated, respectfully submits that the application of the state's anti-discrimination law to this Parade is unconstitutional, and urges this Court to reverse the decision of the Massachusetts courts.

Respectfully submitted,

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